

FILED '11 JUN 20 14:29 USDC-OR

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

ROBERTA A. LILLIE,  
Plaintiff,

Case No. 1:11-cv-00595-CL

v.

NANCY HOWTON,  
Defendant.

**ORDER**

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**PANNER, District Judge:**

Magistrate Judge Mark D. Clarke filed a Report and Recommendation, and the matter is now before this court. See 28 U.S.C. § 636(b)(1)(B), Fed. R. Civ. P. 72(b). When either party objects to any portion of a Magistrate Judge's Report and Recommendation, the district court makes a de novo determination of that portion of the Magistrate Judge's report. 28 U.S.C. § 636(b)(1)(C); McDonnell Douglas Corp. v. Commodore Bus. Mach., Inc., 656 F. 2d 1309, 1313 (9th Cir. 1981).

Here, in response to the Report and Recommendation, plaintiff

moved to file a "first amended petition and award equitable tolling." I consider plaintiff's motion to file an amended petition to be an objection to the Report and Recommendation, and review this matter de novo.

### **DISCUSSION**

Magistrate Judge Clarke recommends dismissing this action on two independent grounds: because plaintiff failed to state a claim against the only defendant, Nancy Howton, who is the superintendent of the Coffee Creek Correctional Facility; and because plaintiff's claim is barred by the two-year statute of limitations. I will address only the statute of limitations issue because it is dispositive.

Plaintiff alleges that on October 12, 2006, while being transported from prison to a medical examination, she fell and injured herself. Plaintiff states that on October 31, 2006, she filed both a grievance and a separate tort claim about her injury; on November 3, 2006, the prison stayed the grievance procedure pending the outcome of the tort claim; and the tort claim was denied on February 7, 2007. Plaintiff commenced this action on May 16, 2011.

In Oregon, claims under 42 U.S.C. § 1983 are subject to a two-year statute of limitations. Sain v. City of Bend, 309 F.3d 1134, 1139 (9th Cir. 2002). Because an inmate may not bring an action in this court before exhausting available administrative remedies with the prison, "the applicable statute of limitations must be tolled while a prisoner completes the mandatory exhaustion

process.” Brown v. Valoff, 422 F.3d 926, 943 (9th Cir. 2005).

Here, plaintiff’s claim accrued on October 12, 2006, when her alleged injury occurred. Maldonado v. Harris, 370 F.3d 945, 955 (9th Cir. 2004) (claim under § 1983 accrues when the plaintiff knew or should have known about the injury on which the claim is based). Plaintiff exhausted her administrative remedies on February 7, 2007, when her tort claim was denied and she chose not to appeal the denial. The two-year statute of limitations began to run on that day. Plaintiff’s subsequent litigation of a state habeas proceeding did not toll the statute of limitations. Because plaintiff waited four years after exhausting administrative remedies to file her complaint, this action must be dismissed with prejudice.

Plaintiff contends that equitable tolling should rescue her otherwise time-barred claim. Equitable tolling may be appropriate “when extraordinary circumstances beyond the plaintiff’s control made it impossible to file a claim on time,” such as when a plaintiff presents “overwhelming evidence” that she was completely disabled during the limitations period. Stoll v. Runyon, 165 F.3d 1238, 1242 (9th Cir. 1999). The burden is on the plaintiff to show equitable tolling is justified. See Hinton v. Pacific Enters., 5 F.3d 391, 395 (9th Cir. 1993).

Plaintiff argues that equitable tolling should apply while she sought counsel from February 2007 to October 2008. Time spent seeking counsel does not justify equitable tolling, and even if I excluded those months from the calculation, this action would

still be time-barred by two years. In her complaint, plaintiff alleges that she "currently has dizzy spells, no memory retention, and some short-term memory loss," but plaintiff does not allege that these problems prevented her from timely filing a complaint.

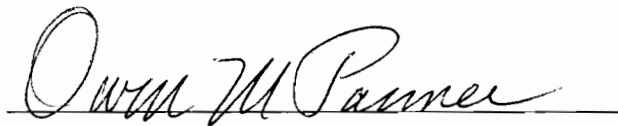
Because the statute of limitations has run, allowing plaintiff to file an amended complaint would be futile. See Deutsch v. Turner Corp., 324 F.3d 692, 718 n.20 (9th Cir. 2003). I ADOPT the Report and Recommendation of Magistrate Judge Clarke.

**CONCLUSION**

Magistrate Judge Clarke's Report and Recommendation (#7) is adopted. Plaintiff's motions for appointment of counsel (#4), and to file a first amended petition (#10), are denied. This action is dismissed with prejudice.

IT IS SO ORDERED.

DATED this 20 day of June, 2011.

A handwritten signature in cursive script, reading "Owen M. Panner", is written over a horizontal line.

OWEN M. PANNER  
U.S. DISTRICT JUDGE